(3)

No. 89-474

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, District Attorney of Dutchess County,
Petitioner,

against

THOMAS J. CORBIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Revised Brief in Opposition to Petition for a Writ of Certiorari

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Questions Presented

1. Whether section 1800(d) of the New York State Vehicle and Traffic Law should be struck down as violative of the Fifth Amendment of the United States Constitution provisions against double jeopardy.

2. Whether respondent's convictions for Driving while Intoxicated and Failure to keep Right furnish a bar under the provisions of the Fifth Amendment against double jeopardy against a subsequent prosecution for various charges of homicide and assault all arising out of the same automobile accident.

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Factual Background as Stated by the New York Court of Appeals

On October 3, 1987, petitioner's automobile allegedly crossed a double yellow line and struck two other vehicles. As a result, petitioner and the passenger of one of the other vehicles were seriously injured and another individual was killed. Tests performed after the accident revealed that petitioner had a .19% blood alcohol level.

On the night of the accident, while he was in the hospital being treated for his own injuries, petitioner was served with two uniform traffic tickets, returnable October 29, 1987, charging him, respectively, with Operating a Motor Vehicle in an Intoxicated condition (Vehicle & Traffic Law section 1192(3)) and Driving on the Wrong Side of the Road (See, Vehicle & Traffic Law section 1120). The return date of these traffic tickets was subsequently changed, apparently without notice to the District Attorney, from the 29th to the 27th of October, a night on which the District Attorney's office did not "cover" the Town Justice Court. The assistant district attorney who had prepared the paperwork on the traffic offense prosecutions (A.D.A. Glick) was inexplicably unaware that the accident had resulted in a fatality and, consequently, his written submissions to the Court, which included a cover letter, a notice pursuant to Criminal Procedure Law section 710.30, and a "statement of readiness," did not alert the Court to the seriousness of the incident.

Petitioner appeared with his attorney on the scheduled return date and entered a plea of guilty to the charges contained in both traffic tickets. Petitioner's attorney did not volunteer that the case involved a fatality and, in response to a question by the Town Justice, indicated that

he had had contact with the District Attorney's office about the case. Although counsel had apparently expressed a preference to have sentence imposed immediately, the Court decided to postpone sentencing until November 17, 1987, because the file contained no sentencing recommendation from the prosecutor.

On the date set for sentencing, the People were represented by A.D.A. Sauter, who was unaware that there had been a fatality, was unable to locate the file and had not spoken to A.D.A. Glick about the case. Nevertheless, Sauter did not request an adjournment so that she could ascertain the facts necessary to make an informed sentencing recommendation.

Petitioner's attorney remained silent, although he was aware that petitioner's automobile had been impounded in connection with an investigation of the accident. Thus, once again, the Court remained ignorant of the severity of petitioner's offense. Petitioner was ultimately sentenced on his guilty pleas to a fine, a six-month revocation of his driver's license and other related sanctions.

During the pendency of the traffic offense prosecution, other staff members within the District Attorney's office had actively been investigating the possibility of pressing more serious charges against petitioner. A.D.A. Chase, who was aware that a person had been killed in the accident, began as early as October 6, 1987 to gather evidence. Despite his active involvement in building a homicide case against petitioner, however, Chase did not attempt to ascertain the date petitioner was scheduled to appear in Town Justice Court on the traffic tickets, nor did he inform either the Town Justice Court or the assistant district attorney covering that Court about his pending investigation. It was not until November 19, 1987,

two days after the fact, that Chase learned of petitioner's guilty plea and sentencing.

A Grand Jury presentment was finally made in early January, 1988. The delay was allegedly occasioned, at least in part, by difficulties that the A.D.A. Chase encountered in obtaining a report by an accident reconstructionist. On January 19, 1988, an Indictment was filed charging petitioner with one count of Reckless Manslaughter (Penal Law section 125.15(1)), two counts of Second-Degree Vehicular Manslaughter (Penal Law section 125.12), one count of Criminally Negligent Homicide (Penal Law section 125.10), one count of Third-Degree Reckless Assault (Penal Law section 120.00(2)), and two counts of Driving While Intoxicated (Vehicle & Traffic Law sections 1192(2), (3)).

Petitioner promptly moved to dismiss the Indictment on double jeopardy grounds. The motion was denied, however, after a hearing in which the County Court in which the action was being prosecuted found that petitioner had procured the traffic prosecution, "without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution" for the more serious homicide charges. (See, Criminal Procedure Law section 40.30(2)(b)). Petitioner then commenced the present proceeding pursuant to Article 78 of the New York State Civil Practice Law and Rules for a writ of prohibition, asserting, once again, that double jeopardy principles barred the prosecution of the January, 1988 Indictment. The Appellate Division dismissed the petition without opinion.

Author's note: The Court of Appeals reversed and prohibited further prosecution.

The Statutes

U.S. Const. Amend. 5:

> . . . [N]or shall any person be subject for the same offense to be twice placed in jeopardy of life or limb . . .

N.Y. State Const., Art. 1, Section 6:

> . . . No person shall be subject to be twice put in jeopardy for the same offense . . .

N.Y. State Criminal Procedure Law:

§ 40.10 Previous prosecution; definitions of terms

The following definitions are applicable to this article:

1. "Offense." An "offense" is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. The same conduct or criminal transaction also establishes separate and distinct offenses when, though violating only one statutory provision, it results in death, injury, loss or other consequences to two or more victims, and such result is an element of the offense as defined. In such case, as many offenses are committed as there are victims.

2. "Criminal transaction" means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so

closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.

§ 40.20 Previous prosecution; when a bar to second prosecution

1. A person may not be twice prosecuted for the same offense.

2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or
(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or
(c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof; or
(d) One of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such person from the same physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense; or
(e) Each offense involves death, injury, loss or other consequence to a different victim; or

(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state.

§ 40.30 Previous prosecution; what constitutes

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or
(b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

2. Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have been prosecuted for an offense, within the meaning of section 40.20, when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or
(b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate

prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its prepleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

§ 40.40 Separate prosecution of jointly prosecutable offenses; when barred

1. Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction, pursuant to paragraph (a) of subdivision two of section 200.20, such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article.

2. When (a) one of two or more joinable offenses of the kind specified in subdivision one is charged in an accusatory instrument, and (b) another is not charged

therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred.

3. When (a) two or more of such offenses are charged in separate accusatory instruments filed in the same court, and (b) an application by the defendant for consolidation thereof for trial purposes, pursuant to subdivision five of section 200.20 or section 100.45, is improperly denied, the commencement of a trial of one such accusatory instrument bars any subsequent prosecution upon any of the other accusatory instruments with respect to any such offense.

N.Y. State Penal Law:

§ 120.00 Assault in the third degree

A person is guilty of assault in the third degree when: . . . .

2. He recklessly causes physical injury to another person; . . . .

Assault in the third degree is a class A misdemeanor.

§ 120.03 Vehicular assault in the second degree

A person is guilty of vehicular assault in the second degree when:

(1) with criminal negligence he causes serious physical injury to another person, and

(2) causes such serious physical injury by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular assault in the second degree is a class E felony.

§ 120.04 Vehicular assault in the first degree

A person is guilty of vehicular assault in the first degree when he:

(1) commits the crime of vehicular assault in the second degree as defined in section 120.03, and

(2) commits such crime while knowing or having reason to know that his license or his privilege of operating a motor vehicle in the state or his privilege of obtaining a license issued by the commissioner of motor vehicles is suspended or revoked and such suspension or revocation is based upon either a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four of the vehicle and traffic law or following a conviction for a violation of any of the provisions of section eleven hundred ninety two of the vehicle and traffic law.

Vehicular assault in the first degree is a class D felony.

§ 125.10 Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony.

§ 125.12 Vehicular manslaughter in the second degree

A person is guilty of vehicular manslaughter in the second degree when he:

(1) commits the crime of criminally negligent homicide as defined in section 125.10, and

(2) causes the death of such other person by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular manslaughter in the second degree is a class D felony.

§ 125.13 Vehicular manslaughter in the first degree

A person is guilty of vehicular manslaughter in the first degree when he:

(1) commits the crime of vehicular manslaughter in the second degree as defined in section 125.12, and

(2) commits such crime while knowing or having reason to know that his license or his privilege of operating a motor vehicle in the state or his privilege of obtaining a license issued by the commissioner of motor vehicles is suspended or revoked and such suspension or revocation is based upon either a refusal to submit to a chemical test

pursuant to section eleven hundred ninety-four of the vehicle and traffic law or following a conviction for a violation of any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular manslaughter in the first degree is a class C felony.

§ 125.15 Manslaughter in the second degree

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person;

. . . .

Manslaughter in the second degree is a class C felony.

New York State Vehicle and Traffic Law:

§ 511. Operation while license or privilege is suspended or revoked; aggravated unlicensed operation

1. Aggravated unlicensed operation of a motor vehicle in the third degree. (a) A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the third degree when he operates a motor vehicle upon a public highway while knowing or having reason to know that his license or his privilege of operating a motor vehicle in this state or his privilege of obtaining a license issued by the commissioner is suspended or revoked.

(b) Aggravated unlicensed operation of a motor vehicle in the third degree is a traffic infraction. When a person is convicted of this offense, the sentence of the court must be: (i) a fine of not less than two hundred dollars

nor more than five hundred dollars; or (ii) a term of imprisonment of not more than fifteen days; or (iii) both such fine and imprisonment.

2. Aggravated unlicensed operation of a motor vehicle in the second degree. (a) A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the second degree when he:

(i) commits the offense of aggravated unlicensed operation of a motor vehicle in the third degree as defined in subdivision one of this section; and

(ii) has previously been convicted of an offense that consists of or includes the elements comprising the offense committed within the immediately preceding eighteen months; or

(iii) the suspension or revocation is based upon a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four of this chapter or upon a conviction for a violation of any of the provisions of section eleven hundred ninety-two of this chapter; or

(iv) the suspension was a mandatory suspension pending prosecution of a charge of a violation of section eleven hundred ninety-two of this chapter ordered pursuant to paragraph (e) of subdivision two of section eleven hundred ninety-three of this chapter or other similar statute.

(b) Aggravated unlicensed operation of a motor vehicle in the second degree is a misdemeanor. When a person is convicted of this crime under subparagraphs (i) and (ii) of paragraph (a) of this subdivision, the sentence of the court must be: (i) a fine of not less than five hundred dollars; and either (ii) a term of imprisonment not to exceed one hundred eighty days or (iii) where appropriate a sentence of probation as provided in subdivision six of this section. When a person is convicted of this crime under subparagraphs (i) and (iii) or (i) and (iv) of paragraph (a) of this subdivision, the sentence of the court must be: (i) a fine of not less than five hundred dollars nor more than one thousand dollars; and either (ii) a term of imprisonment of not less than seven days nor more than one hundred eighty days, or (iii) where appropriate a sentence of probation as provided in subdivision six of this section.

3. Aggravated unlicensed operation of a motor vehicle in the first degree. (a) A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the first degree when he: (i) commits the offense of aggravated unlicensed operation of a motor vehicle in the second degree as provided in subparagraphs (i) and (iii) or (i) and (iv) of paragraph (a) of subdivision two hereof; and

(ii) is operating a motor vehicle while under the influence of alcohol or a drug in violation of subdivision one, two, three, four or five of section eleven hundred ninety-two of this chapter.

(b) Aggravated unlicensed operation of a motor vehicle in the first degree is a class E felony. When a person is convicted of this crime, the sentence of the court must be: (i) a fine as provided in the penal law, but in an amount not less than five hundred dollars; and either (ii) a term of imprisonment as provided in the penal law, or (iii) where appropriate and a term of imprisonment is not required by the penal law, a sentence of probation as provided in subdivision six of this section . . . .

§ 1120. Drive on right side of roadway; exceptions

(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When overtaking or passing pedestrians, animals or obstructions on the right half of the roadway;

3. When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

4. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or

5. Upon a roadway restricted to one-way traffic.

(b) In addition, upon all roadways, any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

(c) Upon any roadway having four or more lanes for moving traffic and providing for two way movement of traffic, no vehicle shall be driven to the left of the center line of the roadway, except when authorized by signs or markings designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under subsection (a)(2) hereof.

§ 1192. Operating a motor vehicle while under the influence of alcohol or drugs . . . .

2. No person shall operate a motor vehicle while he has .10 of one percentum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vehicle while he is in an intoxicated condition. . . .

§ 1196. Conviction for different charge; limitations

1. A driver may be convicted of a violation of subdivision one, two or three of section eleven hundred ninety-two of this chapter, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of section eleven hundred ninety-two of this chapter, and regardless of whether or not such conviction is based on a plea of guilty. . . .

§ 1800. Penalties for traffic infractions

. . . (d) A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an as-

sault or for a homicide committed by any person in operating a motor vehicle or motorcycle.

§ 2304. Constitutionality

If any part or parts of this chapter shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this chapter. The legislature hereby declares that it would have passed the remaining parts of this chapter if it had known that such part or parts thereof would be declared unconstitutional.

Model Rules of Crim. Proc.:

Rule 471. [Joinder or Dismissal of Offenses upon Defendant's Motion.]

(a) Related offenses defined. Two or more offenses are related offenses, for the purposes of this Rule, if they are within the jurisdiction of the same court and are based on the same conduct or arise from the same criminal episode.

(b) Joinder of related offenses. Upon motion of the defendant conforming to Rule 451, the court shall join for trial two or more charges of related offenses, unless it determines that because the prosecuting attorney does not presently have sufficient evidence to warrant trying one or more of the charges, or for some other reason, the joinder would defeat the ends of justice.

(c) Dismissal of related offenses. Upon motion of the defendant conforming to Rule 451, the court shall dismiss a charge of an offense if the defendant was previously convicted or acquitted of a related offense, unless:

(1) The defendant knew he was charged with the offense by the time set by the court for making pretrial motions, but failed to move for joinder of the charges:

(2) A motion for joinder of the charges was previously denied; or

(3) The court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying the charge before the conviction or acquittal of the related offense, or for some other reason, the dismissal would defeat the ends of justice. . . .

Model Penal Code:

§1.07. Method of Prosecution When Conduct Constitutes More Than One Offense

. . . (2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

§ 1.08. When Prosecution Barred by Former Prosecution for the Same Offense

When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances: . . .

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the Court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant. . . .

§ 1.09. When Prosecution Barred by Former Prosecution for Different Offense

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted on the first prosecution; or

(b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of the charge of such offense; or

(c) the same conduct, unless (i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil, or (ii) the second offense was not consummated when the former trial began. . . .

Summary of Argument

1. Section 1800(d) of the New York Vehicle and Traffic Law is so patently unconstitutional in its attempt to eliminate convictions for lesser included offenses as grounds for former jeopardy in violation of long held interpretations of the Fifth Amendment by this Court, *In re Nielsen,* 131 US 176, 33 L.Ed. 118, 9 S.Ct. 672; *Brown v. Ohio,* 432 US 161, 53 L.Ed.2d 187, 97 S.Ct. 2221, that there is no need to relitigate the federal question.

2. The Court of Appeals' ruling that prior convictions for Driving While Intoxicated and Failure to Keep Right constitute a bar to subsequent prosecutions based on the same proof in New York follows the dictum of this Court in *Illinois v. Vitale,* 447 US 410, 65 L.Ed.2d 228, 100 S.Ct. 2260, and is so consonant with the results obtained throughout the states that there is no need for further pronouncement by this Court.

POINT I.

Section 1800(d) of the New York State Vehicle and Traffic Law is void

As set forth in the statutes, the New York Penal Law is replete with lesser included offenses in assault and homicide which are Vehicle and Traffic Law violations. Among these lesser included vehicle and traffic offenses are the following:

(a) Vehicular Manslaughter in the Second Degree (Penal Law section 125.12(2)) which includes Driving While Intoxicated (Vehicle and Traffic Law section 1192));

(b) Vehicular Manslaughter in the First Degree (Penal Law section 125.13) which not only includes Vehicular Manslaughter in the Second Degree but also Driving (knowingly) with License Suspended or Revoked (Vehicle and Traffic Law section 511);

(c) Vehicular Assault in the Second Degree (Penal Law section 120.03) which includes Driving While Intoxicated (Vehicle and Traffic Law section 1192); and

(d) Vehicular Assault in the First Degree which adds also knowingly Driving While License is Suspended or Revoked under certain conditions. (Penal Law section 120.04.)

Section 1800(d) by its terms purports to cancel the constitutional bar against double jeopardy with respect to such vehicle and traffic offenses including the convictions for Driving While Intoxicated and Failure to Keep Right which obtain in this case.

There can be no doubt that the draftsmen of section 1800(d) intended that persons convicted of such lesser included offenses be stripped of the constitutional safeguard. Nor is there any doubt that such legislation flies in the face of the Fifth Amendment as it has long been interpreted by this Court.

> *Whatever the sequence may be,* the Fifth Amendment forbids successive prosecutions and cumulative punishment for a greater and lesser included offense. (*Brown v. Ohio,* 432 US 161, 169 (Emphasis added)

In *Brown,* the Supreme Court was divided on a number of issues. Some dissented as to whether the conviction for the lesser included offense of joy riding was based on conduct which took place at a different time than the conduct for which the appellant was subsequently charged, i.e.: auto theft. Moreover, other Justices concurred but wished the Court to adopt the "criminal transaction" test. (See, Model Rules of Criminal Procedure Rule 471; See also, New York Criminal Procedure Law sections 40.10, 40.20). Nevertheless, the Court was unanimous on the issue which controls this application. They agreed that persons convicted of lesser included offenses were entitled to the constitutional protection against double jeopardy and that that was the understanding of the Supreme Court since *In re Nielsen,* 131 US 176, 33 L.Ed. 118, 9 S.Ct. 672, decided in 1889.

Nielsen was convicted in Utah Territories for the lesser included misdemeanor of Cohabitation with More Than One Woman. The Supreme Court held that the conviction was a bar to subsequent prosecution for the felony of Adultery (with the same women.) In addition, the Court in *Brown* was quite clear in ruling that prior convictions

for lesser included offenses qualified fully as constitutional bars under the statutory analysis adopted by this Court in *Blockburger v. United States,* 284 US 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), of "whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 S.Ct. at 182.

Respondent submits that any reasonable interpretation of the single sentence of section 1800(d) violates the Constitution. Furthermore, the New York State legislature clearly had the threat of unconstitutionality in mind when they also enacted section 2304 of the Vehicle and Traffic Law maintaining the validity of the remaining parts of the Chapter (the entire Vehicle and Traffic Law) in the event of a declaration of unconstitutionality of a part thereof (as in this case). In other words, the draftsmen, by use of a "severability" clause, have wisely ensured that administration of the overwhelmingly valid remaining portions of the Vehicle and Traffic Law would go on unmolested by any result in this case. (See, *Alaska Airlines Inc. v. Brock,* 94 L.Ed.2d 661, 107 S.Ct. 1476, 1481 (1987)). Under such circumstances of legislative intent, respondent urges that section 1800(d) is void as if it had never been enacted. (See, *Norton v. Shelby County,* 118 US 425, 442, 30 L.Ed. 178, 6 S.Ct. 1121; *Ex parte Siebert,* 100 US 371, 376, 25 L.Ed. 717, 719).

It is interesting that this is not the first time section 1800(d) was scrutinized unfavorably by the New York courts. In *Matter of Martinis,* 15 NY2d 240, on remand *sub nom., People v. Martinis,* 46 Misc.2d 1066, affd. 25 AD2d 620, the Court of Appeals was confronted with a situation where an acquittal of the Vehicle and Traffic Law charge of Reckless Driving was interposed as a bar to an indictment for Vehicular Manslaughter. Three judges voted to issue a writ of prohibition and three upheld section 1800(d). The fourth, Judge Adrian Burke, ruled that there was insufficient showing of proof used in support of the Indictment so that the case was sent to trial. Upon a non-jury trial, the justice presiding found proof identical and dismissed the charge upon the grounds of double jeopardy. He was affirmed by the intermediate court so that the clear implication is section 1800(d) was inoperative as of 1965.

Subsequently in 1970, Article 40 of Criminal Procedure Law was enacted whose safeguards would be expected to obviate the problems raised in this case as well as the *Martinis* case.

This is particularly so since section 1800(d) not only contradicts the Constitution of the United States (and presumably N.Y. Const. art. I, section 6) but it is in flat contradiction with Article 40 of the New York Criminal Procedure Law which takes the "criminal transaction" approach to prosecutions requiring "joinder" of charges which involve different proof arising from the same transaction (Criminal Procedure Law section 40.40) as well as barring successive prosecutions based on the same acts unless the elements of the charges are not only disparate but intended to redress very different kinds of harm or evil (except under circumstances which are not relevant to this application). (Criminal Procedure Law section 40.20).

These broad protective provisions (which come into play once section 1800(d) is voided) obviate the need for entertaining any further federal questions in this case since it is quite clear that their employment in this case can only result in a result favorable to respondent. (See, *e.g., People v. Thompson,* 136 Misc.2d 740, 744-5).

Accordingly, respondent takes the position that the voiding of section 1800(d), a rare statutory clause, unique in its blatant violation of the Fifth Amendment, is based on precedent of such ancient and continuous vintage that no conflicts between courts or issues of public importance are involved.

POINT II.

The Court of Appeals ruling is based on well established precedent

The Court of Appeals, as is its prerogative in New York practice, determined that the District Attorney relies on Driving While Intoxicated and Failure to Keep Right as the acts necessary to prove the Homicide and Assault counts of the Indictment. This places the case squarely under the dictum of *Illinois v. Vitale,* 447 US 410, 65 L.Ed.2d 228, 100 S.Ct. 2260, that this respondent has "a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." *Id.* at 2267, 447 US at 422. The only dispositive distinction between this case and *Vitale* is that the pleadings under New York practice removed any doubt as to the acts the State relies upon to establish a conviction under the statutes.

Furthermore, the result in this case tracks the vast majority of jurisdictions which have passed upon the question whether a conviction for driving while intoxicated or other type of traffic offense furnished prior jeopardy so as to bar subsequent prosecutions for homicide or assault arising out of the same accident.

There are the jurisdictions such as New Jersey and Pennsylvania which have adopted sections 107(2), 108(3), and 109(1) of the Model Penal Code which not only create a bar of jeopardy out of convictions for offenses arising out of the same "criminal transaction" but also require the prosecutor to join in one prosecution all charges supportable by facts of which he has knowledge. (See, *e.g., State v. Dively,* 92 NJ 573, 458 A2d 502 (N.J., 1983); *Commonwealth v. Compana,* 455 Pa 622, 314 A2d 854, cert. denied 417 US 969, 41 L.Ed.2d 1139, 94 S.Ct. 3172).

Examples of additional jurisdictions are Texas (See, *e.g., Herrera v. State,* 756 SW2d 120 (Tex. App.-Fort Worth 1988); *Cervantes v. State,* 742 SW2d 768 (Tex. App.-San Antonio 1987); *May v. State,* 726 SW2d 573 (Tex. Cr. App., 1987); *Ex Parte Peterson,* 738 SW2d 688 (Tex. Crim. App., 1987)); Michigan (See, *e.g., People v. White,* 390 Mich. 245, 212 NW2d 222); Florida (See, *e.g., Sanford v. State,* 75 Fla. 393, 78 So. 340); North Carolina (See, *e.g., State v. Griffin,* 51 N.C.App. 564, 277 SE2d 77); and Connecticut (See, *e.g., State v. Lonergan,* 16 Conn.App. 358, 548 A2d 718) which have considered the question whether a subsequent prosecution based upon the same precise conduct and relying upon the same proof is barred. Their conclusions in favor of the bar of double jeopardy are soundly grounded not only in the need to protect citizens from serial prosecution but in sound practical consideration against the proliferation of litigation and in favor of consolidation of all the issues in one tribunal. The disappointment felt by prosecutors of not having "two bites at the apple" is no ground to gainsay these principles.[1]

Petitioner relies on *United States v. Brooklier,* 637 F2d 620, 623-4, cert. denied 450 US 980, 101 S.Ct. 1514, 67 L.Ed.2d 815 (1981), as an example of a Court confused between *Vitale* and *Blockburger*. Actually, the Circuit Court simply held that the Supreme Court has not fully adopted the "criminal transaction" approach as a constitutional bar to federal prosecutions. *People v. Jackson,* 118 Ill2d 179, 514 NE2d 983, can be explained by the peculiar differences which apply to charges which can be levied by police in Illinois, uniform traffic citation and

[1]Respondent trusts that this Court will pay no heed to the calumny asserted against defense counsel apparently as an attempted counter-weight to criticism of petitioner District Attorney's conduct of this case.

complaint forms, although it appears that the construction of the laws of Illinois as to lesser included offenses is more restrictive than ever contemplated by the Supreme Court in *Blockburger*. The same observation applies with greater vigor to the decision in *State v. Seats,* 131 Ariz. 89, 638 P2d 1335.

Conclusion

The application for a writ of certiorari should be denied, with costs.

Respectfully submitted,

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